

Mar 30, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PIERRE T.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 4:19-CV-05015-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 19, 21. Attorney Kevin J. Margado represents Pierre T. (Plaintiff); Special Assistant United States Attorney Alexis Toma represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **DENIES** Plaintiff's Motion for Summary

¹Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

2 **JURISDICTION**

3 Plaintiff filed an application for Supplemental Security Income (SSI) on
4 May 5, 2015, Tr. 743, alleging disability since April 1, 2015, Tr. 839, due to stage
5 three colon cancer and posttraumatic stress disorder (PTSD), Tr. 861. The
6 application was denied initially and upon reconsideration. Tr. 766-69, 773-79.
7 Administrative Law Judge (ALJ) Keith Allred held a hearing on July 31, 2017 and
8 heard testimony from Plaintiff and vocational expert Doug Lear. Tr. 703-42. The
9 ALJ issued an unfavorable decision on January 19, 2018. Tr. 21-36. The Appeals
10 Council denied review on November 30, 2018. Tr. 1-6. The ALJ's January 19,
11 2018 decision became the final decision of the Commissioner, which is appealable
12 to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this
13 action for judicial review on January 29, 2019. ECF No. 1.

14 **STATEMENT OF FACTS**

15 The facts of the case are set forth in the administrative hearing transcript, the
16 ALJ's decision, and the briefs of the parties. They are only briefly summarized
17 here.

18 Plaintiff was 47 years old at the date of application. Tr. 839. The highest
19 grade Plaintiff completed was the tenth in 1985. Tr. 862. His reported work
20 history includes the position of dishwasher at a restaurant and laborer for a
21 temporary employment service. *Id.* When applying for benefits Plaintiff reported
22 that he stopped working on February 1, 2011 because he was let go by his
23 employer. Tr. 861.

24 **STANDARD OF REVIEW**

25 The ALJ is responsible for determining credibility, resolving conflicts in
26 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
27 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
28 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d

1 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
2 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
3 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
4 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
5 another way, substantial evidence is such relevant evidence as a reasonable mind
6 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
7 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
8 interpretation, the court may not substitute its judgment for that of the ALJ.
9 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
10 findings, or if conflicting evidence supports a finding of either disability or non-
11 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
12 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
13 evidence will be set aside if the proper legal standards were not applied in
14 weighing the evidence and making the decision. *Browner v. Secretary of Health*
15 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

16 SEQUENTIAL EVALUATION PROCESS

17 The Commissioner has established a five-step sequential evaluation process
18 for determining whether a person is disabled. 20 C.F.R. §416.920(a); *see Bowen v.*
19 *Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
20 proof rests upon the claimant to establish a prima facie case of entitlement to
21 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
22 claimant establishes that physical or mental impairments prevent him from
23 engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
24 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
25 shifts to the Commissioner to show (1) the claimant can make an adjustment to
26 other work, and (2) the claimant can perform specific jobs that exist in the national
27 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th
28 Cir. 2004). If the claimant cannot make an adjustment to other work in the

1 national economy, he is found “disabled.” 20 C.F.R. § 416.920(a)(4)(v).

2 ADMINISTRATIVE DECISION

3 On January 19, 2018, the ALJ issued a decision finding Plaintiff was not
4 disabled as defined in the Social Security Act from May 5, 2015 through the date
5 of the decision.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since May 5, 2015, the date of application. Tr. 24.

8 At step two, the ALJ determined that Plaintiff had the following severe
9 impairments: colon cancer; emphysema; cardiomyopathy; anxiety disorder; and
10 substance abuse and addiction disorder. Tr. 24.

11 At step three, the ALJ found that Plaintiff did not have an impairment or
12 combination of impairments that met or medically equaled the severity of one of
13 the listed impairments. Tr. 25.

14 At step four, the ALJ assessed Plaintiff’s residual function capacity and
15 determined he could perform a range of light work with the following limitations:

16 [T]he claimant can lift and carry 20 pounds occasionally and ten pounds
17 frequently. He can sit for six hours in an eight-hour workday and stand
18 or walk for six hours in an eight-hour workday with normal rest breaks.
19 He can occasionally climb ramps or stairs, balance, stoop, bend, squat,
20 kneel, crouch, crawl, and climb ladders, ropes or scaffolds. The
21 claimant is able to perform the basic mental demands of competitive,
22 remunerative, unskilled work, including the ability to understand, carry
23 out, and remember simple instructions. He can respond appropriately
24 to supervision, co-workers, and usual work situations, and can deal with
25 changes in a routine work setting. The claimant can perform work that
involves occasional interaction with the general public. The claimant
can tolerate occasional exposure to pulmonary irritants.

26 Tr. 27-28. The ALJ found that Plaintiff did not have any past relevant work. Tr.
27 34.

28 At step five, the ALJ determined that, considering Plaintiff’s age, education,

1 work experience and residual functional capacity, and based on the testimony of
2 the vocational expert, there were other jobs that exist in significant numbers in the
3 national economy Plaintiff could perform, including the jobs of garment folder,
4 inspector hand packager, and electric accessories assembler. Tr. 35. The ALJ
5 concluded Plaintiff was not under a disability within the meaning of the Social
6 Security Act from May 5, 2015, through the date of the ALJ's decision. Tr. 36.

7 ISSUES

8 The question presented is whether substantial evidence supports the ALJ's
9 decision denying benefits and, if so, whether that decision is based on proper legal
10 standards. Plaintiff contends the Appeals Council erred by excluding additional
11 evidence submitted following the ALJ's decision. ECF No. 19 at 4-6. Plaintiff
12 also asserts that the ALJ erred by not properly weighing the opinions of John
13 Haroian, Ph.D. and Daniel Neims, Psy.D., by not considering his skin condition as
14 a severe impairment at step two, by making a flawed residual functional capacity
15 determination, and by issuing an opinion that was not supported by substantial
16 evidence. ECF No. 19 at 6-14.

17 DISCUSSION

18 1. Evidence Submitted to the Appeals Council

19 Plaintiff argues that the Appeals Council erred by excluding additional
20 medical evidence from Coyote Ridge Corrections. ECF No. 19 at 5.

21 Following an unfavorable decision by an ALJ, a claimant may request that
22 the Appeals Council review the decision. 20 C.F.R. § 416.1467. "The Appeals
23 Council may deny or dismiss the request for review, or it may grant the request and
24 either issue a decision or remand the case to an administrative law judge." *Id.* The
25 Appeals Council "will review a case . . . if [s]ubject to paragraph (b) of this
26 section, the Appeals Council receives additional evidence that is new, material, and
27 relates to the period on or before the date of the hearing decision, and there is a
28 reasonable probability that the additional evidence would change the outcome of

1 the decision.” 20 C.F.R. § 416.1470(a)(5). Paragraph (b) states the Appeals
2 Council will only consider additional evidence under paragraph (a)(5) if a claimant
3 shows good cause for not informing the agency or submitting the evidence prior to
4 the ALJ hearing as required in 20 C.F.R. § 416.1435. 20 C.F.R. § 416.1470(b).

5 Following the ALJ’s January 19, 2018 unfavorable decision, Plaintiff filed a
6 request for review by the Appeals Council. Tr. 835. Plaintiff then submitted
7 medical evidence from Coyote Ridge Corrections ranging from May 10, 2011 to
8 May 16, 2018 to the Appeals Council. Tr. 2. The Appeals Council denied
9 Plaintiff’s request for review and did not exhibit the newly submitted medical
10 evidence from Coyote Ridge Corrections for the following reasons: (1) records
11 from May 11, 2015 through May 22, 2017 were not exhibited because they were
12 duplicates of Exhibits 2F, 3F, and 8F; (2) records from June 28, 2007 through May
13 11, 2010 were not exhibited because they were “not material because it is not
14 relevant to your claim for disability”; (3) records from June 6, 2017 through
15 January 16, 2018 were not exhibited because “[w]e find this evidence does not
16 show a reasonable probability that it would change the outcome of the decision”;
17 and (4) records from January 22, 2018 through May 16, 2018 were not exhibited
18 because they do “not relate to the period at issue. Therefore, it does not affect the
19 decision about whether you were disabled beginning on or before January 19,
20 2018.” Tr. 2. Plaintiff argues that the Appeals Council erred by not exhibiting
21 records from June 6, 2017 to May 16, 2018 (date ranges addressed in the Appeals
22 Council Decision reasons 3 and 4). ECF No. 19 at 5. Plaintiff does not challenge
23 the Appeals Council’s decision to not exhibit the other medical evidence from
24 Coyote Ridge Corrections. *Id.*

25 Defendant argues that this Court lacks jurisdiction over the Appeals
26 Council’s actions. ECF No. 21 at 7. The Ninth Circuit has held that district courts
27 do not have jurisdiction to review a decision of the Appeals Council denying a
28 request for review of an ALJ’s decision because the Appeals Council decision is a

1 non-final agency action. *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157,
2 1161 (9th Cir. 2012) *citing Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228,
3 1231 (9th Cir. 2011). When the Appeals Council denies a request for review, the
4 ALJ’s decision becomes the final decision of the Commissioner and the district
5 court reviews the ALJ’s decision for substantial evidence based upon the record as
6 a whole. *Id.* at 1161-62. “[T]he administrative record includes evidence submitted
7 to and considered by the Appeals Council.” *Id.* at 1162. When the Appeals
8 Council fails to “consider” additional evidence that meets the requirements set
9 forth in 20 C.F.R. § 416.1470(b), remand to the ALJ is appropriate. *Taylor*, 659
10 F.3d at 1233 (referencing 20 C.F.R. § 404.970(b), which is the Title II counterpart
11 to 20 C.F.R. § 416.1470(b)). Therefore, whether or not the Appeals Council
12 “considered” new evidence dictates whether or not a remand is appropriate. *See*
13 *Brewes*, 682 F.3d at 1162 (“the final decision of the Commissioner includes the
14 Appeals Council’s denial of review, and the additional evidence considered by that
15 body is ‘evidence upon which the findings and decision complained of are
16 based’”); *see Amor v. Berryhill*, 743 F. App’x 145, 146 (9th Cir. 2018) (“here the
17 Appeals Council only looked at the evidence, and determined it did not meet the
18 standard for consideration,” and therefore, “the new evidence did not become part
19 of the record, and we may not consider it”).

20 This Court joins others in finding that it is not clear how the Appeals
21 Council determined that the new evidence would not impact the outcome of the
22 ALJ’s decision while simultaneously not considering it and not associating it with
23 the record. *McLaughlin v. Saul*, No. 1:18-cv-00967-SKO, 2019 WL 3202806, at
24 *5 (E.D. Cal. July 16, 2019) *citing Deliny S. v. Berryhill*, No. CV 17-06328-DFM,
25 2019 WL 1259410, at *1 (C.D. Cal. Mar. 19, 2019) and *Mayeda-Williams v.*
26 *Comm’r of Soc. Sec. Admin.*, No. 18-0009-HRH, 2019 WL 157918, at *5 (D. Ak.
27 Jan. 10, 2019); *Lena J. v. Comm’r of Soc. Sec. Admin.*, No. C18-6007-RLB-BAT,
28 2019 WL 3291039, at *3 (W.D. Wash. July 1, 2019). Therefore, the Appeals

1 Council should have exhibited the evidence as part of the administrative record.
2 Nonetheless, while the records are not assigned an exhibit number, they are
3 incorporated with the administrative record filed before this Court. *See* ECF No.
4 15.

5 The Court notes that Plaintiff makes the argument that he met the good
6 cause standard under 20 C.F.R. § 416.1470(b). ECF No. 19 at 5. However,
7 Defendant argues that the evidence has been associated with the administrative
8 record. ECF No. 21 at 6-7. Therefore, Defendant concedes the issue of good
9 cause under 20 C.F.R. § 416.1470(b), and the Court need not address it further.

10 The Court must now consider whether the ALJ's decision is supported by
11 substantial evidence considering the record as a whole, including the records from
12 Coyote Ridge Corrections from June 6, 2017 to May 16, 2018.

13 **2. Step Two**

14 Plaintiff challenges the ALJ's step two determination that did not address
15 Plaintiff's skin impairment. ECF No. 19 at 9-12.

16 The step-two analysis is "a de minimis screening device used to dispose of
17 groundless claims." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
18 impairment is "not severe" if it does not "significantly limit" the ability to conduct
19 "basic work activities." 20 C.F.R. § 416.922(a). Basic work activities are
20 "abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 416.922(b). T

21 To show a severe impairment, the claimant must first establish the existence
22 of a medically determinable impairment by providing medical evidence consisting
23 of signs, symptoms, and laboratory findings; the claimant's own statement of
24 symptoms, a diagnosis, or a medical opinion is not sufficient to establish the
25 existence of an impairment. 20 C.F.R. § 416.921. "[O]nce a claimant has shown
26 that he suffers from a medically determinable impairment, he next has the burden
27 of proving that these impairments and their symptoms affect his ability to perform
28 basic work activities." *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir.

1 2001). At step two, the burden of proof is squarely on the Plaintiff to establish the
2 existence of any medically determinable impairment(s) and that such
3 impairments(s) are severe. *Tackett*, 180 F.3d at 1098-99 (In steps one through
4 four, the burden of proof rests upon the claimant to establish a prima facie case of
5 entitlement to disability benefits.).

6 The ALJ's decision did not address cellulitis or dermatitis, but it did mention
7 the presence of intermittent rashes when discussing the residual functional capacity
8 determination. Tr. 30.

9 The record before the ALJ demonstrated recurrent rashes and the diagnosis
10 of methicillin-resistant staphylococcus aureus (MRSA) during treatment for his
11 colon cancer. On October 30, 2015, lesions were present on his skin at his
12 oncology appointment. Tr. 1147, 1369. On March 18, 2016, he complained about
13 an erythematous rash on the skin of the axilla, chest wall, and sometimes scalp. Tr.
14 1396. On examination there were "maculopapular rashes present with mild
15 intensity on the sternum and upper arm. There are erythematous crops of lesions
16 present in the axilla," and no lesions on his scalp. *Id.* On March 21, 2016 his skin
17 rash prevented him from continuing his chemotherapy. Tr. 1399. By March 22,
18 2016, it was noted that his skin condition had improved. Tr. 1398. On March 29,
19 2016, the rashes were gone. Tr. 1404. On May 6, 2016 his rash had returned. Tr.
20 1415-16. On May 8, 2016 Plaintiff presented for wound care, the open sores on
21 his back were swabbed, and the lab confirmed that MRSA was present. Tr. 1325,
22 1418. On May 10, 2016, he presented with a lesion on his left upper inner thigh
23 and a swab showed squamous epithelial cells. Tr. 1326, 1422. On June 17, 2016,
24 the lesions were still present on his back and thigh. Tr. 1425. On November 18,
25 2016, Plaintiff had a lesion on his back consistent with folliculitis. Tr. 1433. On
26 December 27, 2016, Plaintiff had lesions on his back and upper thigh. Tr. 1438.
27 In January of 2017, his "entire skin exam did not reveal abscess signs of
28 cellulitis." Tr. 1475. By February 3, 2017, the lesions were present on his bilateral

1 legs, the center part of his chest, and the upper part of his arms. Tr. 1442.
2 Additionally, MRSA was confirmed in the lesions on his back. Tr. 1441. On April
3 3, 2017, Plaintiff reported that the rashes he was treated for in February were gone.
4 Tr. 1444. He reported a new rash on his scalp and was referred to dermatology.
5 Tr. 1446. On May 22, 2017, Plaintiff had a rash on the dorsum of the left foot that
6 was spreading between the first and second toe. Tr. 1449.

7 Plaintiff cites to several locations in the evidence submitted to the Appeals
8 Council in support of his assertion of a step two error. ECF No. 19 at 9-12. This
9 Court must review the ALJ's decision for substantial evidence based upon the
10 record as a whole. *Brewes*, 682 F.3d at 1161-62. However, Plaintiff only asserted
11 that evidence from Coyote Ridge Corrections from June 6, 2017 to May 16, 2018
12 needed to be associated with the record. ECF No. 19 at 5. In his briefing, he
13 pointed to records from June 2007, Tr. 675, 677, December 2008, Tr. 672, April
14 2009, Tr. 559, 589, May 2009, Tr. 367, June 2010, Tr. 583, February 3, 2017, Tr.
15 300, and June 5, 2017, Tr. 309-10. ECF No. 19 at 10-11. All of this is outside the
16 period he asserted should have been considered and associated with the record.

17 The records he cites within the period of June 6, 2017 to May 16, 2018
18 demonstrate continued rash on his left foot, neck, and arms. *See* ECF No. 19 at 11
19 *citing* Tr. 312-13 (July 17, 2017 exam stating the rash sounds like a "superficial
20 fungal infection"); Tr. 315 (May 21, 2018 request for treatment because he was
21 breaking out in blisters on his back neck and arms); Tr. 578 (December 3, 2017 lab
22 report confirming MRSA). He also points to photos of his arms taken in March of
23 2018, Tr. 604-06, and from an undated visit, Tr. 637-48. ECF No. 19 at 11. While
24 the rashes continued to appear for a period longer than 12 months, the record fails
25 to demonstrate any functional limitation stemming from the rashes.

26 Plaintiff further asserts that his MRSA diagnosis prevents him from being
27 employed in the food service industry. ECF No. 19 at 11. However, the transfer
28 form he cites as evidence of this limitation is dated April 30, 2012 for an upcoming

1 transfer on May 2, 2012, Tr. 366, which is outside the period of time he asserted
2 his Coyote Ridge Corrections records should be associated with the administrative
3 record, and it does not state why this preclusion from food service exists. Tr. 366.
4 The next page discusses his diagnosis of MRSA, but that was for a transfer date of
5 May 1, 2009, Tr. 367, so it is not associated with the April 30, 2012 transfer form.

6 Plaintiff had the burden of proving that his skin condition was a severe
7 medically determinable impairment. While the above records show that the
8 repeated rashes are medically determinable, he has failed to demonstrate that they
9 are severe because there is no evidence in the record of any functional limitations
10 stemming from the repeated rashes.

11 Furthermore, the ALJ addressed the presence of repeated rashes when
12 discussing the residual functional capacity determination: “While the claimant’s
13 infections may cause some limitations, the record does not show that they would
14 prevent him from working at the light level of exertion with the additional
15 restrictions specified above [in the residual functional capacity].” Tr. 30.
16 Therefore, any potential error from not discussing the repeated rashes at step two is
17 harmless. *See Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (any error by
18 ALJ at step two was harmless because the step was resolved in the claimant’s
19 favor).

20 **2. Medical Opinions**

21 Plaintiff argues the ALJ failed to properly consider and weigh the medical
22 opinions expressed by John Haroian, Ph.D. and Daniel Neims, Psy.D. ECF No. 19
23 at 6-9.

24 In weighing medical source opinions, the ALJ should distinguish between
25 three different types of physicians: (1) treating physicians, who actually treat the
26 claimant; (2) examining physicians, who examine but do not treat the claimant;
27 and, (3) nonexamining physicians who neither treat nor examine the claimant.
28 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more

1 weight to the opinion of a treating physician than to the opinion of an examining
2 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
3 should give more weight to the opinion of an examining physician than to the
4 opinion of a nonexamining physician. *Id.* When an examining physician's opinion
5 is not contradicted by another physician, the ALJ may reject the opinion only for
6 "clear and convincing" reasons, and when an examining physician's opinion is
7 contradicted by another physician, the ALJ is only required to provide "specific
8 and legitimate reasons" to reject the opinion. *Lester*, 81 F.3d at 830-31.

9 Defendant argues that the lesser standard of specific and legitimate is
10 applicable in this case. ECF No. 21 at 7-8. However, the record only contains the
11 psychological opinions of Dr. Haroian, Dr. Neims, Dr. Van Dam, and Dr.
12 Robinson. Neither nonexamining psychologists, Dr. Van Dam or Dr. Robinson,
13 provided a mental residual functional capacity opinion such as Dr. Haroian and Dr.
14 Neims. Tr. 474, 756-57. Dr. Van Dam found Plaintiff's substance abuse disorder
15 to be severe. Tr. 474. Dr. Robinson found there to be insufficient evidence to
16 evaluate the severity of Plaintiff's anxiety related disorders and substance
17 addiction disorder. Tr. 756-57. Therefore, the mental residual functional opinion
18 provided by Dr. Haroian and Dr. Neims is uncontradicted in the record, and the
19 clear and convincing standard is applicable.

20 **A. John Haroian Ph.D.**

21 On August 25, 2014, Dr. Haroian completed a Psychological/Psychiatric
22 Evaluation for the Washington Department of Social and Health Services (DSHS).
23 Tr. 921-32. He diagnosed Plaintiff with major depressive disorder, generalized
24 anxiety disorder, adult antisocial behavior, and a rule out of borderline intellectual
25 functioning. Tr. 922. He opined that Plaintiff had a marked limitation in five of
26 the basic work activities and a moderate limitation in seven of the basic work
27 activities. Tr. 923. He opined that Plaintiff's limitations would continue at this
28 severity with available treatment for twelve months. Tr. 924. The ALJ gave the

1 opinion “little weight” for three reasons: (1) Dr. Haroian’s findings and opinions
2 were inconsistent with Plaintiff’s treatment records; (2) Dr. Haroian’s findings and
3 opinions were inconsistent with Plaintiff’s demonstrated abilities; and (3) the
4 opinion was predicated on misrepresentations by Plaintiff. Tr. 33.

5 The ALJ’s first reason for rejecting the opinion, that Dr. Haroian’s findings
6 were inconsistent with Plaintiff’s treatment records, is not clear and convincing.
7 Inconsistency with the majority of objective evidence is a specific and legitimate
8 reason for rejecting physician’s opinions. *Batson*, 359 F.3d at 1195. Here, the
9 ALJ found that “Dr. Haroian’s findings and opinions are inconsistent with the
10 claimant’s treatment records,” but failed to cite any treatment records that
11 undermined the opinion. Tr. 33. Therefore, this reason falls short of the lessor
12 specific and legitimate standard and does not rise to a clear and convincing reason.
13 However, any error resulting from this reason is harmless because the ALJ
14 provided other legally sufficient reasons for rejecting the opinion. *See Tommasetti*
15 *v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (An error is harmless when “it is
16 clear from the record that the . . . error was inconsequential to the ultimate
17 nondisability determination.”).

18 The ALJ’s second reason for rejecting the opinion, that Dr. Haroian’s
19 findings were inconsistent with Plaintiff’s demonstrated abilities, includes two
20 examples of Plaintiff’s activities, and one of the two examples is clear and
21 convincing. The Ninth Circuit has found that a conflict between a physician’s
22 opinion and a claimant’s reported activities to be a specific and legitimate reason to
23 reject the opinion. *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 600-02
24 (9th Cir. 1999). The Ninth Circuit suggests this is also sufficient to meet the clear
25 and convincing standard if the ALJ explains his rationale. *See Popa v. Berryhill*,
26 872 F.3d 901, 906-07 (9th Cir., 2017) (finding that the ALJ did not meet the clear
27 and convincing standard because he failed to explain how the reported activities
28 were inconsistent with the opined limitations). The ALJ’s first example was that

1 “the claimant was able to work as a waiter, a job that involves constant public
2 interaction, at a level that was satisfactory to his employer, and participated in
3 classes when he was able to afford them.” Tr. 33. At the hearing, Plaintiff
4 testified that after he was released from prison and following the chemo treatment,
5 he tried to work as a waiter. Tr. 729. He testified that he had problems with
6 memorizing the menu, he made mistakes, and he eventually stopped going into
7 work. *Id.* Upon further questioning, Plaintiff affirmed that he had not been “let
8 go” or fired by his employer, but he chose to stop showing up for work. Tr. 730.
9 This appears to support the ALJ’s finding. However, Plaintiff’s last reported
10 wages were in 2012, which predates the alleged onset. Tr. 846. Therefore, his
11 ability to perform these tasks is not inconsistent with his allegations because he
12 was not alleging disability simultaneously. Therefore, this reason does not arise to
13 the clear and convincing standard.

14 The ALJ’s second example was that Plaintiff could attend his court ordered
15 classes without difficulty from psychological symptoms. Tr. 33. The record
16 supports this finding. Tr. 1403 (On April 1, 2016 Plaintiff made arrangements for
17 a hotel since attending the Father Engagement class prevented him from getting in
18 line in time for a bed at a shelter); Tr. 1406 (On April 13, 2016, Plaintiff had
19 completed two weeks of Father Engagement with 10 to go); Tr. 1409 (On April 26,
20 2016, Plaintiff reported regularly attending Father Engagement class); Tr. 1419
21 (Plaintiff was attending parenting classes without reported issues); Tr. 1426 (On
22 July 27, 2016 he reported he was not attending the Father Engagement classes, but
23 did not provide a reason); Tr. 1444 (In April of 2017 Plaintiff reported being
24 unable to attend domestic violence class due to the cost); Tr. 1446 (On April 3,
25 2017 Plaintiff was attending outpatient rehab and attending Father Engagement
26 classes, but was unable to afford the domestic violence class); Tr. 1447 (On May
27 22, 2017, Plaintiff reported he was losing parental rights over his child and could
28 still not attend the domestic violence course due to the cost). Plaintiff’s

1 unexplained reasons for not attending the parenting courses and eventually losing
2 parental rights could support Dr. Haroian's opined limitations; however, the
3 proffered reasons he could not attend his courses were usually financial in nature
4 and he was able to resolve the non-financial limitations, such as getting a hotel
5 room when attending classes prevented him from getting a shelter bed,
6 demonstrates his psychological impairments were not preventing his attendance.
7 Because the evidence is susceptible to more than one rational interpretation, the
8 court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
9 1097. Therefore, this portion of the ALJ's second reason for rejecting the opinion
10 meets the clear and convincing standard.

11 The ALJ's third reason for rejecting Dr. Haroian's opinion, that it was
12 predicated on inaccurate information from Plaintiff, is clear and convincing. The
13 ALJ specifically pointed to Plaintiff's reports to Dr. Haroian that he experienced
14 auditory hallucinations, yet this went unreported to all other providers. Tr. 33. At
15 the evaluation, Plaintiff reported that "he sometimes hears voices, mostly the
16 voices happen when he is in anxiety provoking situations, for example when he is
17 in a social situation he will hear a voice telling him you got to get out of here." Tr.
18 921. However, Plaintiff did not report the presence of these hallucinations to any
19 other providers in the record. Furthermore, Plaintiff failed to challenge this reason
20 in his briefing. ECF No. 19 at 6-9. Therefore, he has waived any challenge to this
21 reason. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th
22 Cir. 2008). The Ninth Circuit explained the necessity for providing specific
23 argument:

24 The art of advocacy is not one of mystery. Our adversarial system relies
25 on the advocates to inform the discussion and raise the issues to the
26 court. Particularly on appeal, we have held firm against considering
27 arguments that are not briefed. But the term "brief" in the appellate
28 context does not mean opaque nor is it an exercise in issue spotting.
However much we may importune lawyers to be brief and to get to the

1 point, we have never suggested that they skip the substance of their
2 argument in order to do so. It is no accident that the Federal Rules of
3 Appellate Procedure require the opening brief to contain the
4 “appellant’s contentions and the reasons for them, with citations to the
5 authorities and parts of the record on which the appellant relies.” Fed.
6 R. App. P. 28(a)(9)(A). We require contentions to be accompanied by
7 reasons.

8 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).²

9 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
10 “manufacture arguments for an appellant” and therefore will not consider claims
11 that were not actually argued in appellant’s opening brief. *Greenwood v. Fed.*
12 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to
13 provide adequate briefing, the court declines to consider this issue.

14 **B. Daniel Neims, Psy.D.**

15 On September 10, 2014, Dr. Neims reviewed Dr. Haroian’s opinion and
16 agreed with Dr. Haroian’s opined limitations. Tr. 934, 937 *compare* Tr. 92. The
17 ALJ assigned the opinion “very little weight” for the same reasons he rejected Dr.
18 Haroian’s opinion. Since the ALJ did not commit harmful error in his treatment of
19 Dr. Haroian’s opinion, *see supra*, and Dr. Neims’ opinion was premised solely on
20 Dr. Haroian’s evaluation, the ALJ did not err in rejecting his opinion.

21 **4. Residual Functional Capacity Determination**

22 Plaintiff argues that by the ALJ failing to include his skin impairments at
23 step two, and by rejecting the opinions of Dr. Haroian and Dr. Neims the residual
24 functional capacity determination is fatally flawed. ECF No. 19 at 12-14. This
25 argument is premised on the ALJ erring at step two and in the weighing of the
26 medical opinion evidence. Since the Court found no harmful error in either of
27 these findings by the ALJ, this argument fails.

28 ²Under the current version of the Federal Rules of Appellate Procedure, the
appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 **5. Substantial Evidence**

2 Plaintiff argues that the ALJ's decision is contrary to the evidence in the
3 record and lacks sufficient support. ECF No. 19 at 14. This argument is premised
4 on the ALJ erring at step two and in the weighing of the medical opinion evidence.
5 Since the Court found no harmful error in either of these findings by the ALJ, this
6 argument also fails.

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, the Court finds the
9 ALJ's decision is supported by substantial evidence and free of harmful legal error.
10 Accordingly, **IT IS ORDERED:**

11 1. Defendant's Motion for Summary Judgment, **ECF No. 21**, is
12 **GRANTED.**

13 2. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is **DENIED.**

14 The District Court Executive is directed to file this Order and provide a copy
15 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
16 **and the file shall be CLOSED.**

17 DATED March 30, 2020.



21
22
23
24
25
26
27
28

A handwritten signature in black ink, consisting of a stylized 'M' followed by a series of loops and a horizontal stroke.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE